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IN THE

Supreme Court of the United States

October Term, 1957

No. 840

GUMBINER THEATRICAL ENTERPRISES, INC., *Petitioner*,

v.

NATIONAL THEATRES CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

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In reply to respondent's brief in opposition to the petition for a writ of certiorari, petitioner makes the following observations:

1. In the first two numbered points in its brief, respondent seeks to reshape the issue of the tolling of the New York limitations statute into one of jurisdiction and venue under the federal antitrust laws. Respondent consistently and erroneously assumes that it was

enough to toll the statute in New York "if it could have been sued there" under the antitrust laws. Nothing could be further from the legal truth.

As was said in *Talmadge* v. *United States Shipping Board*, 54 F. 2d 240, 246 (C.A. 2, 1932), "While it is tempting, when one is dealing with a statute of limitations, to construe the words as including any activity which gives the plaintiff an opportunity to sue, we must have more in mind." We must, in other words, have in mind the statutory fact that under the New York statute of limitations in effect during the relevant period, at least two elements were necessary to toll the statute as to respondent: (1) one or more corporate officers had to be present continuously in the state throughout the six-year period, and (2) the corporation had to be doing or transacting business continuously in New York during that period so as to make service in New York upon the officer then physically present in New York valid service on the corporation. These two elements, of course, have no relation to jurisdiction or venue under the Sherman or Clayton Acts. Nor is there any indication that the New York legislature ever adopted the jurisdiction or venue provisions of those federal statutes in establishing its own statute of limitations.

2. Respondent's basic misconception and distortion are reflected and refuted in its own brief. All the effort in that brief to demonstrate from the record that respondent's officers were in fact continuously in New York for purposes of the limitations statute would be irrelevant if in truth the case turned solely on the jurisdiction and venue provisions of the federal antitrust laws.

The respondent must be aware of this inconsistency. The relevant version of Subsection 2 of Section 19 of the New York Civil Practice Act was the version in effect during the critical years of 1932 to 1938. The respondent, however, has misquoted that version by inserting the words "or other persons" after the word "officers", thus making the relevant tolling statute appear more consistent with respondent's attempt to reshape the limitations issue into one of jurisdiction and venue. But the words "or other persons" were not added until 1943, long after the period relevant to this case, as respondent well knows. Under the pertinent version of the New York tolling statute, quoted correctly on pages 3 and 4 of the petition, it is crystal clear that only by the physical presence of *officers* in New York throughout the six-year period of limitations could a foreign corporation like the respondent avoid the tolling effect of Section 19.

3. Respondent has in no way refuted petitioner's main contention that it is entitled as of right to a jury trial on contested factual issues growing out of the limitations plea. That right, as demonstrated in the petition, cannot legitimately be diluted by reliance by an appellate court upon findings growing out of highly contradictory and conflicting facts. That such is the nature of the findings in question is glaringly apparent. As to nine of the ten findings relied upon by the Court of Appeals and demonstrated by the petitioner to be grounded upon disputed evidence, respondent makes no response or comment. And as to the one finding discussed by respondent (Finding No. 33), respondent's position is unsupported by the record (R. 233a) and serves only to emphasize anew the disputed nature of these findings.

4. Respondent has attempted to defend the unwarranted finding implicit in the decision of the Court of Appeals on rehearing that respondent's officers were physically present in New York *continuously* for the six-year period required by the New York statute of limitations. That attempt exposes the invalidity not only of the finding itself but of respondent's entire position.

Respondent, of course, can cite no evidence in the record to support a finding of continuous physical presence. It therefore has to resort to Findings Nos. 30 and 31 of the District Court, not mentioned by the Court of Appeals, to the effect that respondent's officers continuously maintained "their offices and residences" in New York. But it is elementary that service on a corporation cannot be achieved by substituted service upon the office or residence of one of its officers; the officer himself must be physically served. Thus findings that respondent's officers continuously maintained their offices and/or homes in New York are inadequate to support the unwarranted finding of the Court of Appeals that *the officers themselves* were present continuously in New York for six years.

Respondent's desperate attempt to shore up this unfounded finding of the Court of Appeals also exposes afresh the invalidity of respondent's basic premise that the limitations issue was solely one of jurisdiction and venue under the antitrust laws. The continuous physical presence of officers in a jurisdiction for a period of six years, or for any other stated period, has not in any decided case been critical to the presence or absence of juris-

diction under the Sherman or Clayton Acts; nor has such presence been considered decisive in determining venue under those statutes.

5. As to whether the decision below is in conflict with applicable decisions relating to the doctrine of preclusion against inconsistent judicial declarations by a litigant, respondent's only answer is to deny the very existence of the doctrine notwithstanding this Court's express recognition and application of it.

Respondent's denial of the doctrine is premised on its confusion of the rule with that of estoppel. The elements ordinarily necessary to the application of the estoppel doctrine are not present in this case, as respondent notes. But they were similarly absent in all the cases cited in the petition where the doctrine of preclusion was recognized and applied. The application of the preclusion doctrine, in other words, is not dependent upon the elements essential to estoppel.

Thus in *Sturm* v. *Boker,* 150 U.S. 321 (1893), where the estoppel elements were not present, the application of the preclusion doctrine was held to turn upon entirely different considerations. This Court there pointed out that while it did not "controvert the soundness of this general rule"—i.e., of preclusion—"the question here is whether the statements made by the complainant in the insurance suits bring him within the operation of this wholesome rule? We think not, for it would be pressing his language too far to hold that he made any positive statement to the effect that he was the absolute owner of the goods or that he admitted as a matter of fact rather than of opinion that he was responsible for their loss." 150 U.S. at 334.

Moreover, this Court in a lengthy footnote set out in full the testimony at the prior trial which was claimed to be the basis for the application of the preclusion doctrine. 150 U.S. at 335. Both that footnote and the Court's detailed analysis showing that there was no inconsistency in the statement would have been meaningless and superfluous if, as respondent contends, the doctrine of preclusion does not exist. It would then have been necessary only to note that the elements of estoppel were not present.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, a writ of certiorari should issue so that the judgment of the court below may be reviewed.

Respectfully submitted,

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